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No. 85-840

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD A. GINSBURG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his racketeering proceeds are exempt from the pre-1984 forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1963(a)(1), because the government failed to prove that he still possessed the money at the time of his conviction.[1]

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c), and 19 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of five years' conditional probation on all counts and ordered to

[1]Section 1963 was amended in 1984. See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 302, 2301(a)-(c), 98 Stat. 2040, 2192.

forfeit $225,000 of racketeering proceeds, pursuant to 18 U.S.C. 1963(a).[2] A panel of the court of appeals vacated the forfeiture order (Pet. App. 1b-2b). However, the en banc court later reinstated that order (*id.* at 1a-19a).

The evidence at trial is briefly summarized in the opinion of the en banc court (Pet. App. 2a). Petitioner was a partner in a law firm that represented clients before the Cook County Board of (Tax) Appeals between January 1976 and September 1982. During that period, petitioner and his partner, co-defendant Theodore J. Schmidt, bribed employees at the Board of (Tax) Appeals to obtain favorable treatment for their clients. The law firm received $450,000 in legal fees for those cases; petitioner and Schmidt shared the proceeds.

After finding petitioner guilty of mail fraud and racketeering, the jury returned a special verdict of forfeiture, pursuant to Fed. R. Crim. P. 31(e). The district court then ordered petitioner to forfeit $225,000, which represented petitioner's share of the law firm's proceeds for cases before the Board of (Tax) Appeals (Pet. App. 1c-3c).

On appeal, a panel of the court of appeals vacated the forfeiture order, relying on circuit precedent holding that the government could seek forfeiture of interests — in this case, the legal fees — only if the defendant actually still possessed them at the time of conviction (Pet. App. 1b-2b). The en banc court reversed the panel's decision and reinstated the order of forfeiture (*id.* at 1a-19a). The court rejected petitioner's claim that the government was obligated to prove actual possession, at the time of conviction, of forfeitable proceeds. It concluded that neither the plain

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[2]Under the terms of his probation, petitioner is obligated to serve 1000 hours of community service and to make restitution in the sum of $150,000, which would be credited against the forfeiture (Pet. App. 2c).

language of former Section 1963(a) nor its legislative history required that result (see Pet. App. 3a-10a). The court also noted that a subsequent amendment to the forfeiture provision now makes clear that Congress never intended to require proof that the defendant possessed the forfeitable proceeds at the time of conviction (Pet. App. 9a-10a).[3] Two of the eleven judges dissented (Pet. App. 11a-19a).

2. The court of appeals' en banc decision is correct and warrants no further review. It does not conflict with any decision of this Court or another court of appeals. In addition, the question presented is of little continuing importance in light of the congressional amendment of the statute at issue.

The Seventh Circuit, in this case, and the Eleventh Circuit, in *United States* v. *Conner*, 752 F.2d 566 (1985), cert. denied, No. 84-1853 (Oct. 7, 1985), both have rejected the notion that former Section 1963(a)(1) conditioned forfeiture of racketeering proceeds upon the racketeer's actual possession of those funds at the time of conviction. They correctly recognized that an in personam forfeiture of cash proceeds under former Section 1963(a)(1) was a personal money judgment satisfied from a defendant's existing assets, whatever their source. This Court denied a petition for certiorari on that precise issue in *Conner*. The Seventh Circuit's en banc decision, following *Conner*, provides no new reason for this Court's review.

Petitioner contends (Pet. 4-7) that the en banc court incorrectly analyzed the statute and its legislative history. However, he relies (*id.* at 4-5) upon prior panel decisions of the Seventh Circuit that were overruled by the en banc court. There is, accordingly, no currently valid authority supporting petitioner's position. By contrast, the reasoning

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[3]See Pub. L. No. 98-473, Tit. II, §§ 302, 2301(a)-(c), 98 Stat. 2040, 2192.

of the Seventh and Eleventh Circuits is persuasive. Former Section 1963(a)(1) required forfeiture of any interest the defendant acquired or maintained in violation of RICO and contained no requirement that the forfeitable interest be within the defendant's possession at the time of conviction. Congress plainly intended that former Section 1963(a)(1) would exact from racketeers their ill-gotten gains. See *Russello* v. *United States*, 464 U.S. 16, 26-28 (1983). Petitioner offers no explanation why Congress would have exempted from the forfeiture provisions those racketeers who managed to spend, launder or secret away their proceeds prior to conviction.

Finally, we note that the recent amendment of Section 1963 eliminates any need for review by this Court. Under Section 1963, as amended, the government's right to forfeiture of racketeering proceeds vests upon commission of the offense and extends to both property constituting and property "derived from" racketeering profits or proceeds. Moreover, Section 1963 now authorizes a fine of up to twice the amount of any illicit profits or proceeds. Thus, the question presented in this case is irrelevant to future RICO forfeiture actions. Although we believe that the en banc court below correctly resolved the question, its decision will have little continuing importance. Accordingly, review by this Court is unwarranted.[4]

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[4]Petitioner suggests (Pet. 5-6) that the en banc court applied provisions of the new statute in violation of the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3. In fact, the court below did no such thing. The court looked to the 1984 amendments as a confirmation of its statutory interpretation and its analysis of Congress's intent in 1970. See Pet. App. 9a-10a. Contrary to petitioner's assertion (Pet. 5), the court did not "retrospectively apply * * * [the new statute] to litigants in the Seventh Circuit."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986